

Fair Political Practices Commission
MEMORANDUM

To: Chairman Johnson; Commissioners Hodson, Huguenin, Leidigh, and Remy

From: Lawrence T. Woodlock, Senior Commission Counsel
Scott Hallabrin, General Counsel

Subject: Adoption of Regulation 18521.5 – Ballot Measure Committees Controlled by Candidates for Elective State Office

Date: November 13, 2008

Proposed Commission Action and Recommendation: Adopt Regulation 18521.5, which will require that ballot measure committees controlled by candidates for elective state office be organized as “primarily formed” committees as defined by Government Code Section 82047, and that they be established in anticipation of a particular measure or measures. The proposed regulation provides further guidelines governing committee naming conventions, the permissible use of committee funds, and application of contribution limits to these committees under certain circumstances.

Background: Candidates for elective state office commonly control four kinds of recipient committees, as that term is defined at Government Code Section 82013(a). Rules governing three of these four kinds of recipient committees are prescribed in Commission regulations.¹ There is, however, no similar regulation governing the operation of ballot measure committees controlled by candidates for elective state office. These types of committees have increased in recent years, resulting in a substantial flow of unlimited contributions to committees controlled by candidates for elective state office.

The problem was discussed, for example, in a May 5, 2008 article in the Sacramento Bee, which included a useful graphic listing a variety of such committees. (Attached.) In a followup note published the same day in the Bee’s Capitol alert, the author described a legislator preparing to assume a leadership position who did not then control a ballot measure committee – but likely soon would. This legislator is quoted as explaining: “Certainly when I become the leader and responsible for the election and reelection of my [Party] colleagues I am going to want all the legitimate tools at my disposal to do the job.”

¹ The three types of candidate-controlled recipient committees already subject to specific regulations are: (1) campaign committees, governed by Regulation 18521; (2) legal defense funds, treated in Regulation 18530.4 and; (3) officeholder accounts, covered by Regulation 18531.62.

It is generally perceived that candidates may be grateful to their major financial backers and, whenever candidates process large contributions, this perception is more likely to proliferate and erode confidence in the integrity of representative government. This is why voters approved Proposition 34's contribution limits on candidates for elective state office.

Staff believes a regulation is needed to fill the current vacuum, providing rules to ensure that ballot measure committees controlled by candidates for elective state office are formed to support or oppose real ballot measures likely to be presented to the electorate in the foreseeable future, that contribution limits are observed where applicable to such committees, and that contributions to support or oppose ballot measure campaigns are not diverted to unrelated purposes, such as campaigns for elective office. Finally, the regulation requires the committee to be organized as a "primarily formed committee" for a campaign relating to a specific measure or group of measures. This designation requires a focus on a specific ballot measure campaign, and mandates more disclosure than is required from "general purpose" committees.

Discussion: In upholding federal contribution limits against challenge, a six-justice majority of the Supreme Court recently summarized the court's longstanding views on the issue:

"In speaking of 'improper influence' and 'opportunities for abuse' in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, but extending to the threat of politicians too compliant with the wishes of large contributors."
Nixon, et al v. Shrink Missouri Government PAC, et al, 528 U.S. 377, 389 (2000).

The concerns identified by the Supreme Court recur in all cases where candidates solicit contributions to support election campaigns and other political activities. It is only natural to be concerned that elected officials may feel some sense of gratitude to persons who play major roles in funding their political activities, a recognition of critical support that may easily shade into a sense of "obligation." This fundamental concern is elaborated throughout the original Findings and Declarations of the people in support of the Political Reform Act, at Section 81001.

The flow of money through committees controlled by candidates is therefore a matter of special concern to this Commission, which is charged with a duty to provide that such funds be raised and spent in accordance with the provisions of Act which are intended, among other things, to limit the influence of large contributors by ensuring that the funds are indeed raised and spent for legitimate purposes.

Funds raised outside the contribution limits applicable to campaigns for elective state office can and have been used to run surrogate campaigns for elective office, as the Commission may recall in connection with a 2003 campaign that employed ballot measure advertisements

opposing Proposition 54 to promote a replacement candidate in the gubernatorial recall election. Further, beginning with the imposition of contribution limits on state candidate campaign committees, candidates with strong fundraising resources – who formerly raised money into their campaign committees to deter challengers, or to enhance their prospects for leadership positions – have begun to raise larger and larger sums into their controlled ballot measure committees. In short, contribution limits applicable to campaigns for elective state office have not markedly reduced fundraising by these candidates, or the perceived influence of their largest donors.

The Act must not only be construed in a manner that advances its own fundamental goals, but in a way that is consistent with other bodies of applicable law. Of interest here, the Elections Code imposes constraints on funds raised in connection with a measure, beginning as follows:

“Every person who is entrusted with money or things of value for the purpose of promoting or defeating any initiative, referendum, or recall petition or any measure that has qualified for the ballot is a trustee of the money or things of value. If a person wrongfully appropriates the money or things of value to *any* use or purpose not in the due and lawful execution of the trust, the person shall be punishable by a fine....” (Elections Code Section 18680, emphasis added.)

Regulation 18521.5 advances the likelihood that funds raised into ballot measure committees controlled by candidates for elective state office will in fact be used to support or oppose real ballot measures, and that such funds will not be readily available for the other purposes served by old-fashioned candidate “warchests.” Ballot measure spending should not be affected by rules that restrict the diversion of ballot measure funds to other purposes.

The Provisions of Regulation 18521.5:

Subdivision (a) requires that ballot measure committees controlled by candidates for elective state office be “primarily formed,” as is appropriate to a committee formed to support an actual, imminent ballot measure or measures. At present, candidates for elective state office control both “general purpose” and “primarily formed” ballot measure committees. Primarily formed committees are also the preferable vehicle for candidates’ ballot measure campaigns because they provide fuller and more timely disclosure than do general purpose committees.

Subdivisions (b) and (c) specify timelines for opening candidate controlled ballot measure committees. Subdivision (b) provides that a proponent may open a committee at any time to raise funds needed for research, polling, drafting, and other preliminary activities typically used to prepare a measure for qualification.

Under subdivision (c), a candidate other than the proponent of a measure may open a committee to support or oppose the measure once the proponent opens a committee to raise funds to support qualification or passage of the measure. Should the proponent choose not to open a committee to raise or spend money in support of the measure prior to securing a place on the ballot, candidates other than the proponent may open committees to support or oppose the measure as soon as it is clear that the measure will appear on an upcoming ballot.

Subdivision (d) gathers together committee naming requirements.

Subdivision (e) is declaratory of existing law. Because *Citizens to Save California, et al. v. FPPC* (145 Cal.App. 4th 736) held that the Act does not generally authorize contribution limits on candidate controlled ballot measure committees, some candidates may not realize that these committees are nonetheless subject to a contribution limit under circumstances specified by Section 85310(c). Thus a statement relating to the application of Section 85310 seems advisable in this regulation. The limit will apply when the candidate controlling the committee is “clearly identified” in communications disseminated, broadcast, or otherwise published by the committee within 45 days of an election on which the clearly identified candidate appears on the ballot. Regulation 18531.10(a)(1) provides, of course, that a candidate is *not* “clearly identified” merely because his or her name appears in the committee name as required by law “and the candidate is not singled out in the manner of display.”

Subdivision (f) limits committee expenditures to purposes related to the qualification, passage, or defeat of the measure or measures supported or opposed by a candidate controlled ballot measure committee, and specifically prohibits the personal use of committee funds, or the use of committee funds to make contributions or independent expenditures supporting or opposing a candidate for elective office.

Committee funds not used in the ballot measure campaign for which the committee was formed may be returned to the contributors at any time, may be used in another ballot measure campaign if the committee is redesignated for that purpose, or may be transferred to another committee primarily formed to support or oppose another ballot measure or measures. Leftover committee funds may also be donated to *bona fide* charitable, educational, civic, religious, or similar tax-exempt nonprofit organizations, as provided by Section 89519(b)(3).

Subdivision (g) is a transition rule requiring that, within 30 days following the effective date of this regulation, existing *general purpose* ballot measure committees controlled by candidates for elective state office be redesignated as primarily formed committees, unless the candidate either relinquishes control of, or closes, the general purpose ballot measure committee.

Finally, subdivision (f) reminds the reader that the use of funds contributed to a candidate controlled ballot measure committee is at all times subject to the trust imposed by Elections Code Section 18680.

Attachments:
Regulation 18521.5
Newspaper Graphic